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Protecting State Constitutional Rights from Unconstitutional Conditions

Kay L. Levine,[†*] *Jonathan Remy Nash,*[**] *Robert A. Schapiro*[***]

The unconstitutional conditions doctrine limits the ability of governments to force individuals to choose between retaining a right and enjoying a government benefit. The doctrine has primarily remained a creature of federal law, with neither courts nor commentators focusing on the potentially important role of state doctrines of unconstitutional conditions. This omission has become especially significant during the COVID-19 pandemic, as actions by state and local governments have presented unconstitutional conditions questions in a range of novel contexts. The overruling of Roe v. Wade *and the resulting focus on state constitutional rights to abortion will offer additional new settings for state unconstitutional conditions analysis.*

As attention turns to distinctive state constitutional rights — in the context of COVID-19 disputes, abortion litigation, and more generally —

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state courts should develop their own state doctrines of unconstitutional conditions, rather than simply reverting to federal unconstitutional conditions analysis. Three reasons in particular drive this doctrinal claim. First, the unconstitutional conditions doctrine helps to define the scope and weight of a constitutional right. A state court that ignores the unconstitutional conditions doctrine when considering the constitutionality of a state statute or regulation risks undermining the very nature of the right. Second, uncritically adopting federal doctrine ignores the state's distinctive legal framework, interests, and history, all of which might lead to a deviation from federal law. With respect to the topics on which unconstitutional conditions litigation typically focuses, such as licenses and permits, the federal-state disparities are especially stark. Third, robust legal development in our federal system depends in part upon the interplay of different institutional interpreters. When state courts and federal courts engage in independent interpretative activity, they create the possibility of dialogue and mutual learning. This interpretive interplay enhances federal doctrine, as well as doctrinal development in other states. Given the gaps and inconsistencies in the unconstitutional conditions doctrine, such interjurisdictional enlightenment is especially needed in this area. After explaining why states should develop their own doctrines of unconstitutional conditions, we suggest the relevant considerations that should guide states in formulating their doctrines.

TABLE OF CONTENTS

INTRODUCTION 249
I. THE SCHOLARLY LANDSCAPE OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE 258
II. THE CRITICAL AND GROWING DOMAIN OF THE STATE UNCONSTITUTIONAL CONDITIONS PROBLEM 265
III. THEORIZING THE EXISTENCE OF A STATE LEVEL UNCONSTITUTIONAL CONDITIONS DOCTRINE 270
A. Independent State Doctrine 270
B. The Interplay of State and Federal Law 271
C. The Application of the Framework 274
IV. TOWARD A DOCTRINE OF STATE UNCONSTITUTIONAL CONDITIONS 280
CONCLUSION 287

INTRODUCTION

While in the United States we often speak about constitutional rights as sacrosanct and inviolable, in truth our governments constrain constitutional rights in different ways. The government might directly burden a right, such as by enacting prohibitions on certain forms of political advocacy. Alternatively, the government might restrict a right by conditioning the grant of a privilege on the forbearance of that right. For example, the government might condition employment, grants, subsidies, or tax exemptions on the agreement not to engage in political advocacy. By accepting the job, the money, or the tax benefit, an individual or entity forfeits the ability to engage in activity that otherwise would enjoy constitutional protection.

Given the present range of government benefits, including licenses, jobs, grants, and tax exemptions,[1] conditions embedded therein have the potential to burden a vast number of rights-bearing individuals in a variety of ways. In so doing, these benefit programs and employment conditions provide the government with significant leverage over the effective scope of constitutional rights and thereby allow local, state, and federal institutions to exert a measure of control that otherwise would be considered out of bounds. What is more, because they operate on a loose understanding of consent, conditional benefit programs or employment restrictions might allow government institutions to deny constitutional rights to a subset of the population, free from what one scholar has termed "constitutional accountability."[2] For all of these reasons, the impact of these conditions on individuals and on the polity as a whole, vis-à-vis government actors and institutions, should not be underestimated.

The unconstitutional conditions doctrine ("UCD") limits the ability of governments to force individuals to choose between retaining a right

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[1] In 1964, Charles Reich characterized this phenomenon as follows: "Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale." Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

[2] PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 151 (2021).

and enjoying a government benefit.[3] The doctrine[4] embodies the principle that in some circumstances, the government may not use its power as a regulator, employer, or funder to pressure someone to forgo a constitutional right. Even if the government has no independent obligation to provide the privilege, the government might not be permitted to condition the grant of the privilege on an individual yielding a constitutional right. As one of the doctrine's leading analysts has explained, the UCD "reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt."[5] That triumph, however, is partial at best. In many situations, the government has required the recipient of a benefit to relinquish a constitutional right, and courts have blessed that approach as consistent with the Constitution.[6]

Recent events have increased the tension between rights and benefits across the United States. Driven by the public health emergency resulting from the COVID-19 pandemic, governments at the federal, state, and local level have sought to extend their reach in a variety of ways to influence residents' behavior in pursuit of public health outcomes. They have implemented or considered mandates relating to

[3] *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."). For an explanation of the theoretical bases for this doctrine, see *infra* Part I.

[4] Although we are using the unitary term "doctrine" in the text, the degree to which there is a uniform or coherent doctrine about unconstitutional conditions is hotly contested.

[5] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

[6] For cases in which legislative or regulatory limits on constitutional rights were upheld, see, for example, Rust v. Sullivan, 500 U.S. 173 (1991) (upholding program that denied federal funding to clinics that offer abortions while providing funding to those that support childbirth); Regan v. Tax'n With Representation of Wash., 461 U.S. 540 (1983) (upholding the denial of federal tax exemptions to organizations that undertake political advocacy); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upholding the decision to fire a US mint worker who assisted at the polls on election day). *But see, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (finding unconstitutional a zoning board's effort to condition a house building permit on the owner's willingness to grant the public beach access); FCC v. League of Women Voters, 468 U.S. 364 (1984) (holding that educational broadcasting stations receiving federal grants cannot be prohibited from engaging in editorializing); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that denial of unemployment benefits to a Seventh Day Adventist who refused to work on Saturdays imposed an undue burden on her First Amendment right to free exercise of religion).

vaccination, masking, contact tracing, and business operation, among other areas.[7] Some of these regulations are unconditional, directly triggering constitutional scrutiny. Other measures apply only to those who benefit from public employment, licenses, education, or grants. The condition that students be vaccinated to attend the University of Indiana, for example, provoked litigation alleging violations of the UCD.[8] The pandemic thus has presented unconstitutional conditions questions in a range of novel contexts.

That novelty is even more acute with respect to state law. States and localities have been on the forefront of addressing the COVID-19 challenge, and state licenses and benefits have provided a fulcrum for enforcement. This regulatory growth has occurred against a decades-long backdrop of the increasing development of state constitutional rights in many areas.[9] Some of these rights, such as the right against unreasonable search and seizure,[10] may mirror the language of the

[7] For some examples of state COVID-19 rules that have been litigated recently, see *infra* Part II.

[8] *See* Klaassen v. Trs. of Ind. Univ., 549 F. Supp. 3d 836, 868-71 (N.D. Ind. 2021), *vacated as moot*, 24 F.4th 638, 639-40 (7th Cir. 2022). The district court rejected the argument, questioning whether students had a constitutional right against direct imposition of a vaccine mandate. *Id.* at 867-71.

[9] Justice William Brennan long ago urged state courts to rely on state constitutions, rather than simply focus on the United States Constitution, when addressing issues about the scope of rights. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). For discussions of the growing significance of state constitutional rights, see, for example, THE CONSTITUTIONALISM OF AMERICAN STATES (George E. Connor & Christopher W. Hammond eds., 2008) (offering a framework and comparative history of state constitutions); JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006) (looking at state constitutional conventions and debates between 1818 and 1984 and how they departed from the federal Constitution); JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005) (detailing how states are construing their constitutions to offer broader protections for civil liberties than the federal Constitution); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (explaining the importance of lawyers arguing claims under both federal and state law since state constitutions differ in significant ways from the federal Constitution); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009) (tracing the evolution of state constitutional law over the centuries, starting with state constitutions enacted before the federal Constitution, and demonstrating that state constitutions may differ significantly from the federal Constitution); Robert F. Williams, *Foreword*: *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 965-71 (2020) (noting the increasing importance of state constitutional law "as an avenue for pushing *national* subjects").

[10] *See* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE app. A, at 193 (1991) (listing search and seizure provisions in state constitutions that mirror the Fourth Amendment of the United States Constitution).

federal charter but receive independent interpretation in the states, based not just on state authority but on differences derived from a state's history, landscape, legal traditions, or values. Other state constitutional rights, such as the right to education,[11] have no federal analog. The pandemic thus has precipitated a clash between novel restrictions tied to state benefits and evolving understandings of state constitutional rights.[12] This kind of conflict does — or should — implicate state UCDs. The articulation of state constitutional rights to abortion in the wake of *Dobbs v. Jackson Women's Health Organization*[13] may well present additional settings for conflicts between state constitutional rights and state licensing and benefits regimes.[14]

Scholars and courts long have emphasized the independent importance of state constitutions and have decried the tendency of some

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[11] For discussions of state constitutional litigation concerning education, see, for example, MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH STATE COURTS 16-17 (2009) (discussing the California Supreme Court finding a right to education in the state constitution where the U.S. Supreme Court did not find that right guaranteed in the federal Constitution); MICHAEL A. REBELL, COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 10-12 (Supp. 2017), http://schoolfunding.info/wp-content/uploads/2017/07/COURTS-AND-KIDS-2017-Supplement.-07.12.17-.pdf [https://perma.cc/3BXP-HAVU] (discussing post-2008 recession state litigation pertaining to education funding); SUTTON, *supra* note 9, at 22-41 (examining Texas' and Ohio's public school funding schemes and state supreme court decisions that found the funding schemes violated their state constitutions); Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 app. at 1343-48 (1992) (listing state provisions dealing with education rights under state constitutions); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991) (arguing state constitutions provide the most support for state education finance reform litigation). In addition, numerous studies have explored state constitutional school finance litigation in particular states. With respect to judicial attention to this issue, state constitutional litigation concerning school finance dates back to the nineteenth century. *See* Kirk J. Stark, Note, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 YALE L.J. 805, 805-12 (1992).

[12] *See, e.g.*, Ilan Wurman, *Constitutional Laboratories: Some Reflections on COVID-19 Litigation in Arizona*, 15 N.Y.U. J.L. & LIBERTY 792, 792-808 (2022) (noting significance of state law challenges to COVID-19 restrictions).

[13] 142 S. Ct. 2228 (2022), *overruling* Roe v. Wade, 410 U.S. 113 (1973).

[14] *See, e.g.*, Planned Parenthood Nw. v. Members of the Med. Licensing Bd. of Indiana, No. 53C06-2208-PL-001756 (Ind. Cir. Ct. Monroe Cty. Sept. 22, 2022) (relying on state constitution in granting preliminary injunction against Indiana abortion restriction). For a review of state constitutional rights to abortion, see CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS (July 2022), https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf [https://perma.cc/W7NE-49A9].

state courts simply to ignore the distinctive role of state charters.[15] Neither courts nor commentators, though, have focused on the potentially significant role of state doctrines of unconstitutional conditions. They have largely ignored the potential threat from state requirements that individuals give up these rights as a condition of receiving valuable benefits. Given that lack of focus, it is not surprising that the idea of distinctive state UCDs has drawn scant attention in scholarly commentary or in judicial opinions. The concept has not been completely ignored, though: California courts did at one time develop a distinctive state UCD.[16] But other states have not followed California's lead,[17] and the California doctrine has waned in recent decades.[18]

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[15] This call for attention to independent state constitutional rights dates at least to Justice William Brennan's classic article. Brennan, *supra* note 9. For discussion of recent calls for a focus on state constitutional rights, see SUTTON, *supra* note 9, at 7-10; Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 725-26 (2016); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1330 (2019); Williams, *supra* note 9, at 981.

[16] *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 787 (Cal. 1981) (noting distinction between federal and California unconstitutional conditions standards). In *Myers*, the California Supreme Court cited the "*Danskin-Bagley* line of cases" as defining a distinctive state doctrine. *Id.* at 785-86 (citing Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409 (Cal. 1966)); Danskin v. San Diego Unified Sch. Dist., 171 P.2d 885 (Cal. 1946)). We discuss this line of cases in more depth below. *See infra* text accompanying notes 103–21.

[17] A recent state supreme court decision illustrates state courts' apparent reluctance to develop their own doctrines of unconstitutional conditions. In *Board of Supervisors v. Route 29, LLC*, the Virginia Supreme Court asserted that the adoption of the UCD in Virginia predated the recognition of that doctrine by the United States Supreme Court. Bd. of Supervisors v. Route 29, LLC, 872 S.E.2d 872, 878 (Va. 2022) (citing City of Alexandria v. Texas Co., 1 S.E.2d 296 (Va. 1939)). However, the 1939 case cited by the Virginia Supreme Court in its claim of priority actually relied on a previous decision of the United States Supreme Court interpreting the UCD. *See City of Alexandria*, 1 S.E.2d at 299 (citing Frost v. R.R. Comm'n, 271 U.S. 583 (1926)). Moreover, the Virginia Supreme Court applied the UCD in *Board of Supervisors* by invoking federal precedent without considering the possibility of a state-law doctrine of unconstitutional conditions. *See Bd. of Supervisors*, 872 S.E.2d at 878-79 (citing Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)).

[18] California courts have cited the *Danskin-Bagley* California UCD only twice in the past 20 years. In both instances, courts rejected the unconstitutional conditions challenges. *See* City of El Centro v. Lanier, 200 Cal. Rptr. 3d 376, 385-88 (Ct. App. 2016); Evans v. City of Berkeley, 129 P.3d 394, 403 (Cal. 2006). In sustaining an unconstitutional conditions challenge in another case, the California Court of Appeals used the language of the *Danskin-Bagley* test but also relied on federal case law without suggesting anything distinctive about California doctrine. *See* San Diego Cnty. Water Auth. v. Metro. Water Dist., 220 Cal. Rptr. 3d. 346, 375 (Ct. App. 2017).

This gap in the literature and court precedent stands in marked contrast to other areas of state constitutional doctrine. The extensive development of distinctive state constitutional principles in criminal procedure offers an especially notable contrast to the silence concerning unconstitutional conditions.[19] With respect to search and seizure, in particular, courts and commentators have understood the significance of the panoply of doctrines that accompany and protect — or undermine — constitutional rights. Recognizing the importance of these ancillary doctrines when enforcing state constitutional rights, state courts have explicitly addressed whether to adopt federal standards and have sometimes rejected the federal model. For example, some state courts have applied the exclusionary rule to protect state constitutional rights more broadly than federal courts in analogous situations under the federal Constitution.[20] State courts have deviated from the federal standard with respect to a variety of other features of criminal procedure as well, including the plain view doctrine, consent searches, search incident to arrest, and the automobile exception, among others.[21] In these other areas, scholars and judges have acknowledged the significance of these intersecting doctrines. But not in the area of unconstitutional conditions.[22]

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[19] *See, e.g.*, LATZER, *supra* note 10, app. A at 195 (noting particular criminal procedure provisions in state constitutions); WILLIAMS, *supra* note 9, at 196-97 (discussing distinctive state constitutional doctrines); George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1384-99 (1990) (discussing development of distinctive state constitutional doctrine relating to criminal procedure); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 863-64 (1991) (discussing interaction of state and federal constitutional provisions relating to criminal procedure); Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873-75 (1975) (examining "new federalism" and the idea that state decisions on criminal procedure "evade" Supreme Court review through the adequate state ground doctrine).

[20] *See* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1300-02 (1992); Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 422 (2005).

[21] *See* Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 93 tbl.2 (1996); *see also* MARC L. MILLER, RONALD F. WRIGHT, JENIA I. TURNER & KAY L. LEVINE, CRIMINAL PROCEDURES: THE POLICE: CASES, STATUTES, AND EXECUTIVE MATERIALS 74-75 (6th ed. 2019) (discussing state constitutional treatment of pretextual stops).

[22] As illustrated by the United States Supreme Court's landmark decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), addressing the expansion of the federal Medicaid program under the Affordable Care Act, a significant area of focus for the federal UCD has been the federalism implications of the federal government's offering conditional grants to states. *See, e.g.*, Lynn A. Baker, *Conditional*

This Essay seeks to remedy this omission by drawing attention to the state context of the UCD. Given the wide range of important benefits offered by states, and the widespread efforts to use these benefits to lure individuals into forgoing their rights, a UCD defines a crucial dimension of a state constitutional right. We argue that state courts should develop their own state doctrines of unconstitutional conditions, rather than simply reverting to federal unconstitutional conditions analysis to address these issues. Three reasons in particular drive this doctrinal claim.

First and most basically, the UCD helps to define the scope and weight of a constitutional right. Like tiers of scrutiny, the doctrine plays a significant role in protecting the right from governmental incursions because it identifies what sorts of regulatory burdens are too much for the right to bear (and conversely, which regulatory burdens are relatively benign from a constitutional standpoint, despite their intersection with the right). A state court that ignores the UCD when considering the constitutionality of a state statute or regulation risks undermining the very nature of the right.

Second, uncritically adopting federal doctrine ignores the state's distinctive legal framework, interests, and history. As in other areas of state constitutional law, the specific history and structure of the state constitution, along with particular aspects of the state's legal landscape, may differ significantly from the federal setting and demand different interpretive approaches.[23] In the area of unconstitutional conditions, the state setting might be emphatically different from the federal because every state engages in a much greater volume of licensing activity than does the federal government. Indeed, these state licensing regimes have an impact on every aspect of a person's life. From driver's licenses to marriage licenses to occupational licenses to building permits and beyond, state regulatory structures penetrate deeply into our everyday lives.[24] The ability of states to condition licenses on the waiver of constitutional rights represents an enormous source of state

Federal Spending After Lopez, 95 COLUM. L. REV 1911, 1916 (1995) (discussing federalism concerns raised by conditional federal grants); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013) [hereinafter *Unconstitutional Conditions*] (discussing the UCD in the context of Medicaid expansion). In the state constitutional context these particular federalism issues are unlikely to arise. Accordingly, our analysis focuses on constitutional provisions protecting individual rights.

[23] *See* Dodson, *supra* note 15, at 724-26. For example, Florida's right to privacy is broader than the federal right. *See infra* note 86 and accompanying text. Georgia's self-incrimination clause offers more protection than the analogous clause in the Fifth Amendment. *See infra* notes 123–36 and accompanying text.

[24] *See infra* notes 164–66.

power, and it is the function of the UCD to tame this potential source of tyranny.[25]

Third, robust legal development in our federal system depends in part upon the interplay of different institutional interpreters. When state courts and federal courts engage in independent interpretative activity, they create the possibility of dialogue and mutual learning.[26] While commentators debate whether states really serve as laboratories for distinctive social policies,[27] state and federal courts have engaged in a valuable interpretative dialogue in a number of doctrinal areas.[28] But the UCD is not one of those areas, which perhaps has contributed to its incoherent configuration.[29] In light of these shortcomings, federal

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[25] The risk was aptly described by the Supreme Court of Michigan more than 70 years ago:

> Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the state. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office or other place where a licensed activity occurs? It does not appear that legislative ingenuity has yet reached an end to finding reasons and justification for subjecting further myriads of activities to licensing requirements, such reasons ranging from preserving of the public health, safety, morals and welfare to insuring collection of public revenues. Were we to hold that in every instance in which a license may lawfully be required its granting may at the same time be conditioned upon waiver of constitutional rights against unreasonable search, what area could conceivably remain immune and beyond legislative reach, upon which the constitutional guaranty might still operate?

People *ex rel.* Roth v. Younger, 42 N.W.2d 120, 125 (Mich. 1950).

[26] *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 98-101 (2009); SUTTON, *supra* note 9, at 19-20; *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 341-46 (2011) (discussing state constitutional law as a "useful tool" in interpreting the federal Constitution).

[27] *See, e.g.*, Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009) (reviewing literature critical of "laboratories" argument); *see also* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 488-91 (1996) (discussing limited explanatory power of the "states-as-laboratories" metaphor).

[28] *See* SCHAPIRO, *supra* note 26, at 98-101.

[29] *See* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) [hereinafter *Coercion Without Baselines*] ("The Supreme Court's failure to provide coherent guidance on the subject is, alas, legendary."); Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323, 364 (2016) (noting with respect to the UCD that "the doctrine's lack of coherence and logical weakness are well established"); Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 395 (2016) (memorably characterizing the UCD as an "enormous hairball").

doctrine could certainly benefit from state courts' careful articulation of coherent doctrines of unconstitutional conditions. To the extent states rely solely on state-specific sources, their conclusions would offer less direct aid to federal courts, but state court opinions that specify relevant lines of inquiry or identify the most important interpretative factors could serve as useful resources for federal courts, as well as for courts in sister states. Thus, the benefits of state courts developing independent doctrines of unconstitutional conditions would multiply well beyond the borders of each state.

For all of these reasons, we argue that states should formulate their own doctrines of unconstitutional conditions, and we suggest the relevant considerations that should guide states in developing these doctrines. State UCDs will assist with protecting both individual rights and public health and safety, during the pandemic and beyond — both in each state and in the United States as a whole.[30]

Two clarifications are in order. First, our argument focuses on the problem of state courts neglecting to develop a state-law doctrine of unconstitutional conditions. If this analysis were undertaken by state courts, some of them might ultimately adopt the substance of federal doctrine while others pursue divergent approaches. It is the absence of analysis that we criticize. Second, it may be that some states end up adopting different UCDs in different areas of the law, and others opt for a more uniform approach. We do not intend here to intervene in the debate about whether the UCD should be understood as a single transsubstantive principle, or whether it varies across different areas of law.[31]

The argument unfolds as follows. Part I reviews the scholarly literature about the UCD that has developed in the context of federal constitutional rights. Part II notes the many settings in which states might condition benefits on the waiver of state constitutional rights, as

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[30] Another extremely important area of potential relevance for state UCDs is plea bargaining in criminal cases. In both state and federal courts, prosecutors routinely ask defendants to waive their constitutional rights in return for a reduced sentence, yet the U.S. Supreme Court has not recognized this behavior as within the unconstitutional conditions framework as a matter of federal due process. *See* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831-37 (2003); Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/ [https://perma.cc/L4YK-988H]. In a related article, we discuss the Supreme Court's refusal to consider UCD arguments in the context of criminal procedure issues generally, including plea bargaining. Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, The Unconstitutional Conditions Vacuum in Criminal Procedure (June 2022) (unpublished manuscript) (draft on file with authors).

[31] *See infra* notes 64–71 and accompanying text.

well as those settings in which conditions already exist. Novel mandates arising from the COVID-19 pandemic in particular signal the value of developing a state doctrine of unconstitutional conditions in these locations, as well as more generally. In Part III we develop a doctrinal blueprint for analyzing the role of a state UCD within the federal system of the United States. Given the frequent interconnection and overlap of state and federal rights, we seek to clarify the distinctive domain for a state UCD. Building on the existing scholarly literature, Part IV develops the key features of a state doctrine of unconstitutional conditions and argues that states should articulate individual doctrines within the particular contexts of their state constitutional jurisprudence.

I. THE SCHOLARLY LANDSCAPE OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Scholars have long grappled with the contours and principles that undergird the UCD, invoking political and economic issues at the core of the doctrine. From a political perspective, the government may have a legitimate purpose in imposing conditions on certain benefits, such as government spending, employment, or licenses. However, there is a risk in allowing the government to accomplish indirectly that which it cannot do directly. If a constitutional provision prohibits the government from violating a right, why can the government condition a valuable benefit on a person forsaking that right? The economic perspective recognizes that an individual may want to enter into a bargain with the government to give up a right in return for a benefit.[32] Why should the law not allow such voluntary, presumably utility-enhancing transactions to occur? That said, commentators adopting an economic approach warn of the potential for governments, perhaps captured by special interests, to exercise their monopoly power to interfere with the market in ways that may not enhance social welfare.[33]

[32] "Constitutional economics, in contrast, directs analytical attention to the choice *among* constraints, choices that are made ex ante by individuals in seeking to restrict their own and others' subsequent choice sets in the ordinary political sphere." Charles K. Rowley, *Public Choice and Constitutional Political Economy*, *in* READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 3, 23 (Charles K. Rowley & Friedrich Schneider eds., 2008).

[33] *See generally* Robert D. Tollison, *The Perspective of Economics*, *in* READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY, *supra* note 32, at 191 (applying the economic perspective to the branches of government — the legislature, judiciary, and executive — and other political actors such as interest groups, bureaucracy, and voters).

Deploying these different perspectives, scholars have offered various opinions about when the government may condition a benefit on the forbearance of a constitutional right. Their answers have ranged from always to sometimes to never.

The "always" and "never" positions have generally been occupied by commentators focusing on political concerns. These theorists emphasize the presence or absence of governmental power, rather than the efficiency of the proposed transaction. At one extreme lies the position that the greater power to grant or deny the benefit includes the lesser power to impose any condition, including the forfeiture of a constitutional right. This position is often associated with Justice Holmes's statement, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[34] Especially given the pervasiveness of modern regulation and licensing regimes, this position would grant extraordinary power to the government. Commentators (and courts) have generally rejected this argument.[35]

At the other extreme, some scholars have insisted that the government may never do indirectly what it could not do directly. Philip Hamburger, for example, has argued that the Constitution places categorical boundaries on government jurisdiction and that many programmatic, regulatory conditions inappropriately allow the government to act outside of these boundaries.[36] He has emphasized that an individual's consent cannot authorize the government to exceed the limits of its authority (whether in exchange for discretionary benefits or otherwise)[37] because "The People" as a whole, even those who do not consent, deserve protection from the government's "cascade

[34] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

[35] *See* Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1029-30 (2011) (noting general rejection of this "laissez-faire" approach).

[36] Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012); *see* HAMBURGER, *supra* note 2, at 153-56; *see also* Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1181 (2019) ("Phillip Hamburger advocates for perhaps the strongest brand of the unconstitutional conditions doctrine, justifying the doctrine as a means of preventing governmental circumvention of constitutionally-prescribed limits on government power."). Hamburger cites Justice Joseph Bradley for the view that "the government simply 'has no power to impose unconstitutional conditions.'" HAMBURGER, *supra* note 2, at 152 (quoting Doyle v. Cont'l Ins., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting)).

[37] HAMBURGER, *supra* note 2, at 153-80 (comparing the circumstances in which consent is appropriate to those in which it is inappropriate as a tool to shift the balance of power between government and citizen).

of evasions" of the Constitution's requirements.[38] Hamburger has, for example, questioned the ability of Congress to condition a tax exemption on an organization forgoing political activity, even if the organization agrees, because this kind of restriction deprives the public of valuable speech that should be protected by the First Amendment.[39] More generally, Hamburger and others have emphasized the danger of the government using its vast resources to buy up constitutional rights and enhance its power without limits.[40] He has warned that this "dangerous irregular pathway for control"[41] will likely generate resentment in the population, which will eventually undermine democracy.[42] Louis Fisher has recently advanced a similar argument within an "anticommodificationist" framework; he has rejected the conception of rights as mere goods that may be sold to the government by individuals.[43] Despite this powerful rhetoric, the doctrine has not proceeded along these lines, as restrictions have been permitted in certain circumstances.

Between the extremes of never and always, other scholars have advanced intermediate approaches that sometimes allow and sometimes

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[38] *Id.* at 89. Notably, Hamburger seems most concerned about actions taken by the administrative state to impose regulations with conditions; he admits that many of these actions would be fine if undertaken by Congress, because presumably the population could vote out of office any legislator whose actions in this regard were unacceptable. *See id.* at 62-63.

[39] Hamburger, *supra* note 36, at 493-99.

[40] HAMBURGER, *supra* note 2, at 17; *see* Fisher, *supra* note 36, at 1170-71 ("As the 'modern regulatory and welfare state' has expanded and the federal government has come to provide 'more goods, services, and exemptions,' the government's opportunities to condition such benefits on the 'sacrifice of constitutional rights' have likewise increased."); *see also* Baker, *supra* note 22, at 1916 (noting concern that Congress could seek to use its spending power to evade constitutional restrictions on its regulatory authority).

[41] HAMBURGER, *supra* note 2, at 17.

[42] *Id.* at 156 ("[W]hen these limits on government can, by means of consent, be rendered unequal, they lose the strength of widely shared communal commitments, and are apt to be eroded — with high costs even for those who did not consent. . . . [W]hen government can make a separate peace with some Americans, the others cannot rely on their support against oppression."). Relatedly, Kathleen Sullivan has argued that we ought to pay attention to the hierarchy created by conditional benefit schemes that target the poor. Any program that is made available to poor residents of the country in return for a sacrifice of their constitutional rights leaves wealthier residents immune from this kind of sacrifice, thus creating and reinforcing a "caste hierarchy" within the population of the United States. She warns that the government ought not to exploit a circumstance in which the "poor may have nothing to trade but their liberties." Sullivan, *supra* note 5, at 1498.

[43] Fisher, *supra* note 36, at 1172-75.

prohibit the exchange of benefits for rights, depending on a variety of circumstances.[44] Endeavoring to rationalize Supreme Court doctrine, Robert Hale offered a classic account of this kind in 1935.[45] He found that the cases involved consideration of several factors, such as the germaneness of the conditions, the nature of the right at issue, and the nature of the benefit.[46] For example, the question arose whether the state could condition use of its highways on a company relinquishing certain constitutional rights, such as the right (then recognized) to fix its own rates. A critical issue, as Hale understood the cases, was whether forgoing the right to set rates was related to the state's interest in maintaining its highways, or whether instead the exclusion from the highways functioned as an unrelated punishment.[47] In another part of his analysis, Hale noted that certain rights had a special status that generally invalidated attempted interference by the state.[48] Examples included attempts by the state to induce companies to relinquish their right to remove cases from state to federal court.[49] But in other areas, the government enjoyed especially strong control over the kinds of benefits it offered and correspondingly broad authority to impose conditions. Hale suggested that funding programs and government contracts qualified for especially broad governmental prerogative.[50]

More recent scholarship has sought to highlight a single, determinative factor. These works have generally emphasized coercion as the key concern. From this perspective, a government offer of a benefit in exchange for a right is unconstitutional if the offer is unduly coercive. A recurring concern is how to establish a baseline for assessing coercion. The rightsholder would always prefer the benefit without the condition. At the same time, the rightsholder is better off if she has the option to accept the benefit with the condition than if no benefit were offered, and the rightsholder always retains the option to refuse the offered benefit. However, given the essential need for various permits,

[44] *See, e.g.*, Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 817-18 (2012) (discussing the UCD in context of prisons, using example of prisoners giving up rights to be involved in a sex-offender treatment program); Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1030-31 (2011) (discussing the application of UCD to prisons and prisoners sacrificing rights to participate in prison programs).

[45] Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 321-25 (1935).

[46] *See id.* at 350-59.

[47] *Id.* at 349-51.

[48] *See id.* at 325.

[49] *Id.* at 343.

[50] *Id.* at 357.

licenses, and the like, the rightsholder may well perceive the "choice" to be illusory, akin to the robber's options of "Your money or your life." At what point does the government's offer to grant (or maintain) the benefit in return for the forbearance of the right become coercive? As discussed above, scholars who adopt a political perspective have emphasized the danger of circumventing constitutional restraints on governmental power, while commentators who employ an economic framework have highlighted the potential for governmental abuse of its favored bargaining position.

Advancing a political framework, for example, Seth Kreimer has argued for limits on the government's power to leverage its control of vast benefits to undermine constitutional protections.[51] To distinguish between permissible government offers and prohibited threats, Kreimer has offered various baselines drawn from history, equality, and prediction of government action to define the baseline from which to assess coercion.[52] Other commentators have focused on the government's purpose.[53] Does the government withhold the benefit for the purpose of inducing the person not to exercise the right, or does the government seek to advance an independent, legitimate purpose? This question may not be easy to answer. Mitchell Berman has advanced this inquiry by posing the following hypothetical: If the government knew that the individual would decline to exchange the right for the benefit, would the government refuse to grant the benefit? Or would it grant the benefit notwithstanding the rightsholder's refusal to yield?[54] If, knowing that the rightsholder would refuse the deal, the government would grant the benefit anyway to advance the government's interest, then the government's denial of the benefit is likely for the purpose of punishing the exercise of the right. According to Berman, in that circumstance the offered condition should be regarded as unconstitutional.

Other scholars seek to establish a baseline by reference to economic efficiency. One influential theorist adopting this approach is Richard

[51] Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1395-97 (1984).

[52] *Id.* at 1359-74 (explaining three baselines).

[53] *See, e.g.*, Berman, *Unconstitutional Conditions*, *supra* note 22, at 1283 (applying the coercion test in context of Medicaid expansion); Berman, *Coercion Without Baselines*, *supra* note 29 (developing the test for government coercion).

[54] Berman, *Coercion Without Baselines*, *supra* note 29, at 46.

Epstein.[55] Epstein has expressed concern about the government's ability to use its monopoly power to squelch beneficial competition.[56] In his view, ideally the U.S. Constitution itself would directly prohibit much post-New Deal regulation, including most licensing and permitting requirements.[57] However, as the doctrine has not developed in that direction, he has posited the UCD as a valuable second-best solution,[58] a way to prohibit the government from using its licensing monopoly to encroach further on individual liberties.[59] The doctrine constrains the government's ability to engage in such economic coercion. By restricting the government's authority to impose conditions, the UCD forces the government to choose between granting everyone the benefit and denying the benefit to all. Epstein has asserted that facing this choice, the government will adopt less restrictive licensing and permitting regimes.[60]

Also adopting an economic perspective, Einer Elhauge has looked to contract law to define coercion.[61] This approach yields a counterfactual inquiry similar to, but distinct from, Berman's political framework. Elhauge has asked, if the government were constitutionally forbidden from offering the conditioned benefit, what would it do? Would it offer the benefit without the condition, or would it not offer the benefit at all?[62] To put it slightly differently, presumably, the government's first choice would be to confer the benefit and have the individual relinquish the right. The key question is, what is the government's second choice? Assuming that the person will not give up the right, would the government prefer to offer the benefit or not?[63] That baseline defines the difference between a permissible offer and an unconstitutional threat. If the government lacks the ability to impose the condition and consequently would not grant the benefit, then it would be better for both the government and the individual to allow the condition to be imposed so that the benefit might be offered. The individual is better off

[55] *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 11-12 (1993); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 14-15 (1988).

[56] Epstein, *supra* note 55, at 21-22.

[57] *See* EPSTEIN, *supra* note 55, at 209-10; Epstein, *supra* note 55, at 104.

[58] EPSTEIN, *supra* note 55, at 209-10.

[59] *See* Epstein, *supra* note 55, at 73.

[60] *See id.* at 38.

[61] Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 544 (2016).

[62] *See id.* at 522-23.

[63] *See id.* at 557-58.

with a conditioned benefit than with no benefit, and the government is better off giving people a conditioned benefit rather than an unconditioned benefit. If the government actually preferred to grant unconditioned benefits over denying the benefit altogether, then the government's threat to withhold the benefit would impermissibly burden the exercise of the constitutional right.

Other commentators have rejected the attempt to define a transsubstantive theory of unconstitutional conditions and instead focus on the particular rights at issue. Kathleen Sullivan, for example, has emphasized the distributional consequences of the government's bargaining power.[64] She has argued that governmental conduct is especially suspect when it burdens rights that specifically guard the private sphere against government intrusion; rights to government neutrality; or benefits targeted to individuals with special dependency.[65] Examples of these categories include, respectively, rights to reproductive autonomy,[66] First Amendment rights,[67] and welfare benefits.[68] Cass Sunstein has gone further, rejecting the existence of the UCD as a recognizable doctrinal entity.[69] He has argued that the interests protected by the doctrine would be better served by focusing on the particular rights at issue and the scope of permissible governmental burdens.[70] By insisting on special rules for government benefits, such as licenses and subsidies, the UCD privileges a status quo baseline of government inaction. For example, consider the issue of whether the governmental Medicaid program may fund childbirth, but not abortion. The UCD asks whether, if a jurisdiction recognizes a right to an abortion, the government may condition the benefit of healthcare funding on not exercising the right to an abortion. Instead, if one

[64] Sullivan, *supra* note 5, at 1421.

[65] *Id.*; *see also* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1257 (1990) (noting the government's monopoly on "financial assistance and in-kind benefits to the poor" and the difficulty of developing a positive theory of the UCD that would apply across doctrinal areas).

[66] Sullivan, *supra* note 5, at 1492. If the government were to condition the receipt of welfare on a woman's agreement to take birth control or to accept the Norplant device, that would constitute a problematic burden on her right to reproductive choice. HAMBURGER, *supra* note 2, at 164.

[67] *See* Sullivan, *supra* note 5, at 1496.

[68] *Id.* at 1498.

[69] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 291-318 (1993); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594-95 (1990).

[70] SUNSTEIN, *supra* note 69, at 291-318; Sunstein, *supra* note 69, at 594-95.

assumes a world in which the government funds all necessary medical treatment for indigent people, the question is simply whether the government may penalize a woman for exercising her right to an abortion.[71]

Our goal in this project is not to insist on the superiority of one particular theoretical framework. We seek instead to highlight the important, recurrent, yet largely unexamined, unconstitutional conditions issues that arise on the state level. State courts recognize state constitutional rights, and they analyze potentially discretionary benefits. They do not, though, generally articulate state UCDs; they assess the legality of benefit schemes exclusively with reference to federal law and federal doctrines. Once state courts begin to formulate state UCDs, they might rely on factors resembling those that have emerged as salient in the federal court jurisprudence.[72] Examples include the germaneness of the regulation, the nature of the constitutional right, the significance of the discretionary benefit, and the coercive character of the bargain. But state courts might identify other factors or assign different weights, according to their own state constitutional histories, legal traditions, and values. In Part IV, we discuss how these factors might inform the UCDs that states would design.

II. THE CRITICAL AND GROWING DOMAIN OF THE STATE UNCONSTITUTIONAL CONDITIONS PROBLEM

State constitutional rights intersect with state-granted privileges across a range of issues, potentially implicating a state-level UCD. Recent state court decisions have grappled with, for example, conditioning building permits on construction of affordable housing in California[73] and conditioning medical malpractice suits on waiver of the right to privacy of medical information in Florida.[74] The right to be free from unreasonable searches has been particularly burdened by state statutes and regulations in recent years. For example, building on implied consent laws in the "driving under the influence of an

[71] *See* Sunstein, *supra* note 69, at 602-03.

[72] For examples of federal UCD cases articulating one or more of these factors, see *supra* note 6.

[73] Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 986-96 (Cal. 2015).

[74] Weaver v. Myers, 229 So. 3d 1118, 1125-41 (Fla. 2017).

intoxicant" ("DUI") context,[75] Michigan[76] and Nevada[77] condition the grant of a firearms license on the gun owner's agreement to submit to alcohol tests in certain circumstances. States including Mississippi,[78] New Hampshire,[79] and North Dakota[80] require submission to an alcohol test as a condition of hunting in the state. Still others condition hunting and fishing on agreement to container searches[81] or weapons inspections.[82] Missouri broadly requires that persons "using the wildlife or forestry resources of this state" allow inspection of their catch and of devices used to take or transport wildlife.[83] Georgia went beyond the search context to condition the right to drive on the waiver of state

[75] *See, e.g.*, CAL. VEH. CODE § 23612(a)(1)(A) (2022) (deeming a person who drives a motor vehicle as giving his or her consent to a blood draw to determine alcoholic content); FLA. STAT. § 316.1932(1)(a) (2022) ("A person . . . operating a motor vehicle within this state is . . . deemed to have given his or her consent to submit to an approved chemical test or physical test . . . ."); GA. CODE ANN. § 40-5-55(a) (2022) (implying consent to blood testing from any person who operates a vehicle in violation of Georgia's DUI statute); IND. CODE ANN. § 9-30-6-1 (2022) ("A person who operates a vehicle impliedly consents to submit to the chemical test provisions of this chapter as a condition of operating a vehicle in Indiana."); LA. STAT. ANN. § 32:661(A)(1) (2022) ("Any person, regardless of age, who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent . . . to a chemical test or tests of his blood . . . ."); MISS. CODE ANN. § 63-11-5(1)(a) (2022) ("Any person who operates a motor vehicle upon the public highways, public roads and streets of this state shall be deemed to have given his consent . . . to a chemical test or tests of his breath, blood or urine for the purpose of determining alcohol concentration."); *see also* South Dakota v. Neville, 459 U.S. 553, 559 (1983) (validating implied consent schemes generally in the interest of highway safety).

[76] MICH. COMP. LAWS ANN. § 28.425k(1) (2015).

[77] NEV. REV. STAT. ANN. § 202. 257(a)-(b) (2019).

[78] MISS. CODE ANN. § 49-7-301(1) (2022).

[79] N.H. REV. STAT. ANN. § 214:20-d(I) (2017).

[80] N.D. CENT. CODE § 20.1-15-01 (2021).

[81] *See, e.g.*, CAL. FISH & GAME CODE § 1006(b) (2022) (allowing the Department of Fish and Wildlife to search all boxes and packages containing "birds, mammals, fish, reptiles, or amphibia"); *see also* Ed R. Haden & Adam K. Israel, *The Fourth Amendment, Game Wardens, and Hunters*, 46 CUMB. L. REV. 79, 79 (2016) ("In most states, a game warden may search any containers the hunter may have with him or in his motor vehicle for game without any reason to believe there has been a violation of the game laws.").

[82] *See, e.g.*, HAW. REV. STAT. §13-123-22(1)(D) (1996) (establishing implied consent to inspection once a hunter signs his or her hunting license).

[83] MO. CODE REGS. ANN. tit. 3, § 10-4.125 (2022); *accord* MO. REV. STAT. § 252.100.1 (2022); *see also* Travis R. McLain, *The Constitutionality of Fish and Wildlife Related Searches and Seizures Conducted by Conservation Agents in Missouri*, 62 ST. LOUIS U. L.J. 713, 719 (2018) ("Conservation agents conduct routine stops and searches, without suspicion of any criminal wrongdoing, of persons engaged in fish and wildlife related activities: hunting, fishing, trapping, and the commercial uses of fish and wildlife.").

constitutional protections against self-incrimination.[84] All of these provisions potentially implicate state constitutional rights and suggest the need for analysis under state UCDs.

As COVID-19 has given rise to significant new areas of state regulation to support public health, COVID-related laws may well implicate state constitutional rights as well as privileges in a variety of areas. These novel restrictions have spawned extensive litigation in numerous states as of this writing. These cases explicitly or implicitly reference the UCD and highlight the significance of the doctrine as a tool to safeguard state constitutional rights from regulatory or statutory encroachment. In none of the cases, however, do the litigants or the courts suggest even the possibility of a state doctrine of unconstitutional conditions. All of the references are exclusively to federal doctrine.[85]

Litigation in Florida, for example, has invoked the UCD to address the balance between local COVID-19 safety protocols and certain state constitutional rights.[86] In the first instance, Governor Ron DeSantis and Commissioner of Education Richard Corcoran sought to deny funding to school districts that did not return to in-person instruction.[87] But parents and teachers, among other plaintiffs, argued that the Florida Constitution guaranteed the right to attend a safe public school, and they felt unsafe due to COVID before vaccines were available.[88] The plaintiffs asserted that under the UCD, the state could not force plaintiffs to forgo their right to a safe education as a condition of receiving the state funds.[89] *Green v. Alachua County*,[90] another Florida case, concerned a county mandate broadly requiring masks in public

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84 Olevik v. State, 806 S.E.2d 505, 522-23 (Ga. 2017); *see infra* Part III.C. We use the past tense here because the Supreme Court of Georgia recently found this burden to be unconstitutional according to the state's constitution. Elliot v. State, 824 S.E.2d 265, 287 (Ga. 2019).

85 *See, e.g.*, Answer Brief of Appellees at 27-28, DeSantis v. Fla. Educ. Ass'n, 306 So. 3d 1202 (Fla. Dist. Ct. App. 2020) (No. 20-2350) (citing federal case law in support of argument that conditioning funding on forgoing state constitutional right violates the UCD).

86 *Id.*; *see* Green v. Alachua Cnty., 323 So. 3d 246, 252-54 (Fla. Dist. Ct. App. 2021) (discussing a Florida county mask mandate and the state constitutional right to privacy).

87 Fla. Dep't of Educ., DOE Order No. 2020-EO-06, Emergency Order (July 6, 2020), https://www.fldoe.org/core/fileparse.php/19861/urlt/DOE-2020-EO-06.pdf [https://perma.cc/MAL2-CE2E] ("Waiving Strict Adherence To The Florida Education Code, As Specified [ ] Pursuant To Executive Order Number 20-52, Made Necessary By The COVID-19 Public Health Emergency[.]").

88 Answer Brief of Appellees, *supra* note 85, at 27-28.

89 *Id.*

90 *Green*, 323 So. 3d at 248.

spaces, including on public transit. The state appellate court found that the mandate violated the right to privacy established by the Florida Constitution.[91] While the opinion did not address the UCD, the mandate certainly could prompt a challenge by a Florida resident who felt compelled to forgo his constitutional right not to wear a mask (part of the state right to privacy, according to *Green*[92]), as a condition of using public transit.

In addressing a vaccine mandate at the University of Indiana, the federal district court in *Klaassen v. Trustees of Indiana University* did reference the UCD.[93] After finding that the plaintiffs had no right to attend the university, the court accepted the plaintiffs' contention that attending a public university did constitute a valuable government benefit.[94] However, because the court concluded that the plaintiffs had no constitutional right to refuse vaccination, the conditional benefit did not intersect with any state constitutional right and the unconstitutional conditions claim ultimately failed. The court distinguished the *Green* case on the basis of the distinctive nature of the Florida constitutional right to privacy.[95]

In contesting New York City's COVID-19 testing requirement for all students attending public schools, parents similarly argued that the mandate violated the UCD.[96] They asserted that a mandatory testing requirement violated their rights under federal and state law and contended that the government could not "conditio[n] access to school on submission to an illegal" test.[97] This case is still pending.

Employment constitutes one of the most significant government benefits protected by the UCD, and this area also has given rise to COVID-related litigation. Law Professor Todd Zywicki, for instance, relied on the UCD in challenging the vaccine mandate imposed by George Mason University, a public university in Virginia.[98] Zywicki

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[91] *Id.* at 253-55.

[92] *Id.* at 253-54.

[93] Klaassen v. Trs. of Ind. Univ., 549 F. Supp. 3d 836, 868 n.120 (N.D. Ind. 2021), *vacated as moot*, 24 F.4th 638 (7th Cir. 2022).

[94] *Id.*

[95] *Id.* at 889. The court's decision in *Klaassen* strongly suggested that, given the state constitutional right to privacy in Florida, a vaccine mandate at a public university in Florida would be vulnerable to a challenge under the UCD.

[96] Brief for Appellants at *32-33, Aviles v. De Blasio, No. 21-721, 2021 WL 2917313 (2d Cir. July 7, 2021).

[97] *Id.* at *33. The plaintiffs did not, though, clearly articulate the state constitutional basis of their claim. *See id.*

[98] Complaint for Declaratory Judgment and Injunctive Relief at e, g, j, Zywicki v. Washington, No. 21-CV-00894 (E.D. Va. Aug. 3, 2021).

asserted that the university could not condition his employment on forgoing his constitutional right to refuse vaccination.[99]

While the COVID-19 litigation so far has focused on the government benefits of employment, funding, and access to education and on the state constitutional rights to education and privacy, the domain of state unconstitutional conditions cases could easily grow. If we experience another pandemic, governments may wish to re-impose or expand public health requirements of masking, vaccination, and testing. They might require contact tracing technology in the workplace or school setting. These sorts of explicit mandates, created to protect and preserve the health of the population generally, will intersect with a variety of state constitutional rights (including protections of privacy, religion, public assembly, and private property), prompting claims by state residents that their constitutional rights have been violated.

If direct mandates fail constitutional scrutiny, governments might turn to conditional benefit approaches as an alternative way to protect and preserve public health. They might, for instance, require compliance as a condition of utilizing government services or facilities, or as a condition for obtaining licenses for professions, such as medicine or nursing, or for activities, such as driving or hunting. Notably, in seeking to require COVID-19 vaccination of health care workers, the federal government mandated employee vaccination programs as a condition of receiving federal Medicare or Medicaid funding.[100] If states recognize state constitutional rights to abortion, state courts will need to assess the burdens imposed by funding or licensing requirements. For example, to what extent will states be able to tie dollars or licenses to the recipients agreeing to forgo a state constitutional right to abortion? It is notable that the most fully articulated development of a state doctrine of unconstitutional conditions occurred in a case concerning a state constitutional right to abortion, years before the *Dobbs* decision.[101]

To address this clash of governmental benefits and state constitutional rights, states will need to develop state-specific doctrines of unconstitutional conditions. The next Part establishes a blueprint for conceptualizing the doctrine at the state level.

[99] *Id.* e.

[100] Biden v. Missouri, 142 S. Ct. 647, 652-53 (2022) (per curiam) (granting stay of injunction and accepting condition as legitimate exercise of federal authority).

[101] *See* Comm. to Defend Reprod. Rts. v. Myers, 625 P.2d 779, 787-89 (Cal. 1981). For a discussion of *Myers*, see *infra* notes 115–21 and accompanying text.

III. THEORIZING THE EXISTENCE OF A STATE LEVEL UNCONSTITUTIONAL CONDITIONS DOCTRINE

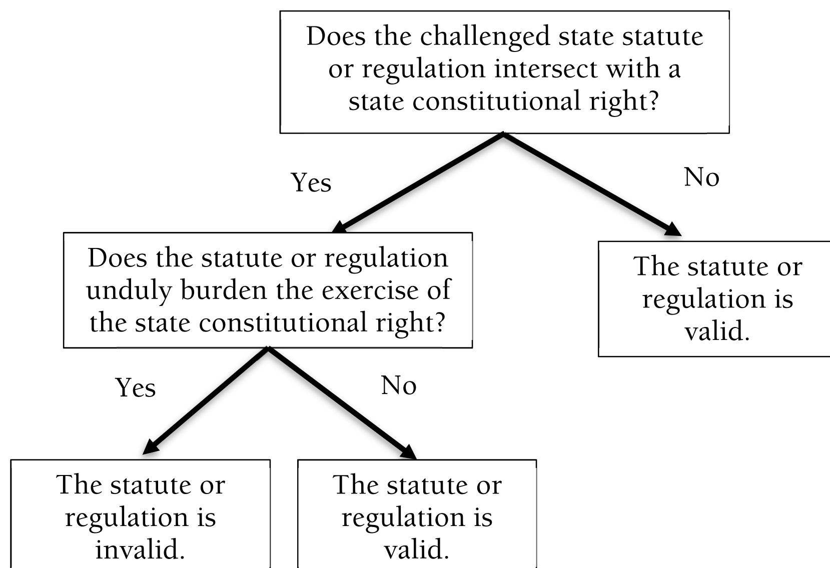
In this Part, we consider state constitutional rights and the state UCDs. We first examine state constitutional rights that have no counterparts in the federal Constitution. We then turn to state constitutional rights that have federal constitutional analogs; those settings present greater complexity.

A. Independent State Doctrine

Where a state constitutional right finds no parallel in the federal Constitution, the state court would need a state UCD to determine whether a local or state program violates that right.[102] Figure 1 presents a flowchart of the relevant analytical steps. Under such a doctrine, a constitutional violation occurs only if the court finds two things to be true: (i) the state constitutional right in fact intersects with the state statute or regulation under review, and (ii) any applicable state UCD deems the imposition on the state constitutional right unduly burdensome. This outcome is represented by the lower left-hand box in Figure 1. In contrast, if the court finds that the challenged government program does not intersect with the state constitutional right, or that such program does not pose an undue burden, there is no violation.

[102] We assume that any applicable UCD is part-and-parcel of the right itself. Thus, a state is free to afford a right without any limiting UCD; in that instance, the right would be immune from, and would remain robust in the face of, any interference by statutes or regulations.

Figure 1: Steps in the UCD analysis to consider standalone state constitutional rights



To be sure, applying the state UCD may present complexities. The courts might have difficulty deciding whether particular state benefits, such as licenses, are truly discretionary as a matter of state law. The appropriateness of the bargain at the core of unconstitutional conditions cases — the exchange of a constitutional right for a discretionary benefit — may also present interpretive complexity. Nevertheless, the governing legal framework is clear. State law determines all of the essential elements: (1) the existence of a constitutional right; (2) the nature of a government benefit; and (3) whether the terms of the exchange (of benefit for right) are unduly burdensome.

B. The Interplay of State and Federal Law

In situations in which the federal and state constitutions protect analogous rights, the interplay of state constitutional law, federal constitutional law, and unconstitutional conditions is more complicated. State law may provide greater protection of the constitutional right at issue than does the federal Constitution. Moreover, state law may provide a more robust, or more lenient, UCD than can be found in the federal courts. Table 1 provides a taxonomy of the comparative protections offered by state law, as opposed to federal law.

Table 1: Taxonomy of protections afforded by state, as opposed to federal, law

		Is the state constitutional right broader than the corresponding federal constitutional right?	
		No	*Yes*
How does the scope of the applicable state unconstitutional conditions doctrine compare to the scope of the applicable federal unconstitutional conditions doctrine?	*Narrower scope*	*Setting A*: Irrelevant.	*Setting D*: There is a greater likelihood that the government action (standing alone) violates the state constitution, but also a greater likelihood that a court will find that the state unconstitutional conditions doctrine protects the government action.
	Identical in scope	*Setting B*: Irrelevant.	*Setting E*: There is a greater likelihood that the government action (standing alone) violates the state constitution, which in turn will require inquiry into whether the state unconstitutional conditions doctrine is satisfied.
	Broader scope	*Setting C*: Assuming there would otherwise be a constitutional violation, the state unconstitutional conditions doctrine will provide greater relief than the federal analog.	*Setting F*: There is a greater likelihood that the government action (standing alone) violates the state constitution, and also a greater likelihood that a court will find that the state unconstitutional conditions doctrine does not protect the government action.

In Table 1 shown above, we consider the circumstances under which state law might provide more protection to individuals than does federal law. (If federal law precludes the government action — whether because the Constitution forbids the government to take the action outright, or because the Constitution prohibits the government from inducing waiver of individuals' rights — then the result under state law is not determinative.) In the column on the left (which includes Settings *A*, *B*, and *C*), the state constitutional right is coextensive with its federal analog. Thus, state constitutional law will only provide greater protection to a citizen if state UCD makes it *harder* for the government to extract the individual's waiver of a state constitutional right than does federal UCD. In Setting *A*, where the UCD is narrower than its federal analog, state law is of no help to the individual. That is also true in Setting *B*, where state and federal UCDs are identical in scope. In Setting *C*, by contrast, the state UCD imposes more limits on government action, and so may provide an individual with relief where federal law does not.

In the column on the right (which includes Settings *D*, *E*, and *F*), the state constitutional right is broader than its federal analog. But knowing the state right is broader than the federal right is not by itself enough to predict whether the plaintiff (rights-holder) will prevail in a lawsuit against the government; one also has to know how the state court will assess the weight of the regulatory burden on that right. State courts might require more or less than federal courts would require in order to be convinced that the regulatory burden is unduly burdensome.

In Setting *D*, although the state right is broader than the federal right, the applicable state UCD is narrower than its federal analog (which means the regulatory burden must be heavier in order for the plaintiff to prevail). Thus, the individual will prevail only if two conditions are met: (i) the state UCD (though narrower than its federal analog) is broad enough to recognize an intersection between the state constitutional right and the statute/regulation, and (ii) there is enough evidence to support a finding that the state statute or regulation is unduly burdensome on the exercise of the right. Because the amount of evidence required would be more than that required to sustain the claim in federal court, state law is likely to be of little use to the individual rights-holder in these circumstances.

In Setting *E*, although the state right is broader than its federal counterpart, the applicable state and federal UCDs are identical. Here, the individual will prevail only if the same two conditions are met: (i) the state UCD is broad enough to recognize an intersection between the state constitutional right and the statute/regulation, and (ii) there is

enough evidence to support a finding that the state statute or regulation is unduly burdensome on the exercise of the right. But if the individual lacked protection under federal law because the federal UCD finds no burden, then so too will state law afford no protection (assuming the state is self-consciously modeling its own UCD to remain consistent with federal UCD law).

In Setting *F*, both the state right *and* the state UCD are broader than their federal analogs. As in the prior two settings, state law will afford an individual protection when federal law does not if (i) the statute or regulation intersects with the state right (even though it does not intersect with the federal analog right) and (ii) the burden on the right according to state constitutional law is unacceptable. The key point is this: a smaller quantity of evidence would be required to establish an undue burden on the state right than would have been required to establish an undue burden on the federal right, because the state level UCD is more expansive than its federal counterpart. This means that the individual rights-holder stands a greater chance of winning on her state law claim than on a federal law claim. In sum, Settings *C* and *F* offer rights-holders the greatest opportunity for success when challenging state or local programs, but this opportunity will only arise if state supreme courts take seriously their obligation to articulate state level UCDs.

C. The Application of the Framework

A California line of cases illustrates these principles. California courts developed a distinctive state UCD, broader than the federal doctrine, in a pair of cases in the mid-twentieth century, *Danskin v. San Diego Unified School District*[103] and *Bagley v. Washington Township Hospital District*.[104] *Danskin* concerned a school board's policy governing use of a public school auditorium.[105] The policy required that those seeking to use the facility swear that neither they, nor any organization with which they were affiliated, advocated the unlawful overthrow of the government of the United States or of any state.[106] The California Supreme Court held that the required oath constituted an unconstitutional condition that impermissibly burdened the free speech rights of the applicants.[107] In *Bagley*, the California Supreme Court considered the constitutionality of prohibiting public employees from

[103] Danskin v. San Diego Unified Sch. Dist., 171 P.2d 885, 891-94 (Cal. 1946).
[104] Bagley v. Wash. Twp. Hosp. Dist., 421 P.2d 409, 411-16 (Cal. 1966).
[105] *Danskin*, 171 P.2d at 887-88.
[106] *Id.* at 888.
[107] *Id.* at 893.

engaging in certain political activity relating to elections.[108] The court articulated a three-part test for assessing conditions on public employment.[109] Under that test the government must demonstrate: "(1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available."[110] Applying that framework, the court held the restriction on political activity was unconstitutional.[111]

In *Danskin* and *Bagley*, the California Supreme Court did not purport to develop a UCD that differed from federal doctrine. Those cases concerned constitutional challenges focused on the First Amendment of the United States Constitution. The court did not rely on any distinctive provision of the California Constitution. However, in 1981 in *Committee to Defend Reproductive Rights v. Myers*,[112] the California Supreme Court refined and generalized the approach of *Danskin* and *Bagley* and explicitly rejected the federal unconstitutional conditions approach adopted by the United States Supreme Court.

Myers concerned a challenge to a California statute that restricted the use of state money to fund abortions under California's Medi-Cal program. At that time, the United States Supreme Court interpreted the Fourteenth Amendment to guarantee a constitutional right to abortion.[113] In *Harris v. McRae*,[114] decided one year before *Myers*, the United States Supreme Court rejected a challenge under the United States Constitution to a federal law that barred the use of federal funds to pay for abortions through the Medicaid program. In *Myers*, the California Supreme Court emphasized that, compared with the federal Constitution, California law offered both a broader constitutional right to an abortion and a UCD more protective against governmental burdens.[115] Citing its prior case law, the court noted that the explicit protection of privacy in the California Constitution swept more broadly than the implicit protection of privacy developed in federal doctrine.[116]

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[108] *Bagley*, 421 P.2d at 412.
[109] *Id.* at 411.
[110] *Id.*
[111] *Id.* at 413-16.
[112] Comm. to Defend Reprod. Rts. v. Myers, 625 P.2d 779, 787-89 (Cal. 1981).
[113] *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[114] 448 U.S. 297, 311-26 (1980).
[115] *Myers*, 629 P.2d at 784-89.
[116] *Id.* at 784 (citing City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980)).

The court also concluded that the *Danskin-Bagley* line of cases offered a more robust UCD than available under federal law.[117] In particular, the California doctrine did not depend on whether a condition placed an additional burden on the exercise of a right or whether individuals had a private alternative to accepting the conditioned benefit. The California doctrine instead focused directly on the ways in which the condition burdened the state constitutional right and whether the condition was the least restrictive means to achieve the government's goal.[118]

The California Supreme Court then restated the unconstitutional conditions test established in *Bagley* in more general form:

> (1) whether the conditions which are imposed relate to the purposes of the legislation which provide the benefit; (2) whether the utility of the conditions imposed clearly outweighs the resulting impairment of constitutional rights; and (3) whether there are no less offensive alternatives available to achieve the state's objective.[119]

Finding that the restriction on Medi-Cal funding violated all three prongs of the test, the court held that the funding ban violated the California Constitution.[120]

In *Myers*, the California Supreme Court illustrated Setting *F* in Table 1. As the court summarized its approach, "[I]n evaluating the constitutionality of the challenged statutory provisions under the California Constitution, we employ the test established by the California unconstitutional condition cases."[121] The California Constitution recognizes a right to privacy that is broader than the federal analog, and the California UCD doctrine articulated in *Myers* protects rights more broadly than the federal UCD. This distinctive California UCD, however, has not received wide application up to this point. California courts have cited the *Danskin-Bagley* distinctive California UCD in only two cases over the past twenty years, and they rejected the unconstitutional conditions challenges both times.[122] But the vitality of this doctrine may re-emerge in the wake of the Supreme Court's decision in *Dobbs*, as state constitutional abortion rights have become a focus of intensive litigation for the first time in half a century.

[117] *Id.* at 787-89.
[118] *Id.* at 788-89.
[119] *Id.* at 789.
[120] *Id.* at 790-99.
[121] *Id.* at 789.
[122] *See supra* note 18.

Recent DUI litigation from the state of Georgia[123] offers an additional illustration of the application of the taxonomy of Table 1. In *Olevik v. State*,[124] the Georgia Supreme Court recognized that the right against self-incrimination under the Georgia Constitution exceeded the scope of the Fifth Amendment self-incrimination right in the United States Constitution. In contrast to the federal right, the state right covers compelled behavior as well as speech. The Georgia Supreme Court then held that forcing a driver to submit to a breathalyzer test for blood alcohol content[125] following an arrest for driving under the influence

[123] Police enforcement of DUI laws has given rise to several issues under the Fourth Amendment, mostly concerning whether blood alcohol tests can be performed by police in the absence of a search warrant. The Court has considered the constitutionality of warrantless taking of blood and breath samples under both the search incident to arrest exception to the warrant requirement, for example, Birchfield v. North Dakota, 579 U.S. 438, 476 (2016), and the exigent circumstances exception, for example, Mitchell v. Wisconsin, 139 S. Ct. 2525, 2534-35 (2019) (assessing whether it is justifiable to take blood under this exception if the driver is unconscious and cannot be given a breath test); Missouri v. McNeely, 569 U.S. 141, 145 (2013) (considering whether the dissipation of Blood Alcohol Content ("BAC") level after drinking ceases constitutes a per se exigency); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (determining if forcing the extraction of a blood sample can be justified under certain exigent circumstances). Through this series of cases, the Court concluded that breath samples but not blood samples may be compelled under the search incident to arrest exception. *Birchfield*, 579 U.S. at 476. However, blood samples may be compelled using the exigent circumstances doctrine if BAC levels are dissipating and law enforcement priorities in accident investigation take precedence over the warrant process, or if the driver's blood is going to be taken for a medical purpose (e.g., because they were rendered unconscious or in need of urgent medical care), *Mitchell*, 139 S. Ct. at 2537-38. Other drivers who are simply arrested for DUI cannot be compelled to give a blood sample using a general claim of exigent circumstances. *McNeely*, 569 U.S. at 165.

Recently, in *Mitchell*, the Court refused to accept the argument that implied consent alone justified the taking of blood samples. *See Mitchell*, 139 S. Ct. at 2532-33. While it did not fully analyze this claim, it directly rejected the proposition that implied consent is the equivalent of actual consent. *Id.* (remarking that implied consent laws do not "create actual consent to all the searches they authorize"). Implied consent provisions categorically deem all drivers on state roads to have consented, by the mere fact of driving, to provide blood, breath and/or urine samples without a warrant if they are arrested for driving while intoxicated. *See* statutes cited *supra* note 75. Implied consent provisions potentially pose an unconstitutional conditions problem, but the Court has never addressed them in that manner.

[124] Olevik v. State, 806 S.E.2d 505, 508-09 (Ga. 2017). This was not the first time the Georgia Supreme Court recognized the breadth of the state constitutional privilege against self-incrimination. Previous holdings in accord with *Olevik* span more than a century. *See, e.g.*, Brown v. State, 426 S.E.2d 559 (Ga. 1993) (defendant could not be compelled to give a handwriting exemplar); Day v. State, 63 Ga. 667 (1879) (defendant could not be compelled to place his foot in a footprint).

[125] The court left undisturbed prior precedent declaring no conflict between compelled urine tests and self-incrimination. *See* Green v. State, 398 S.E.2d 360, 362

amounted to compelled behavior within the meaning of the state constitutional provision, even though it did not violate the federal self-incrimination provision.[126]

A subsequent case, *Elliott v. State*,[127] built on *Olevik*'s foundation. In *Elliott*, the Georgia Supreme Court held that a driver who refused the breathalyzer could not have this fact introduced against her at trial as proof of guilt.[128] Imposing evidentiary consequences for exercise of the state constitutional right imposed too much of a burden on the right, the court said.[129] However, the state was still permitted to impose administrative consequences — revocation of the driver's license for a period of time. The permissibility of conditioning the license on the waiver of the right was made explicit only in a concurring opinion,[130] but no other Justice challenged that conclusion. In the final case of the Georgia DUI trilogy, *State v. Turnquest*,[131] the Georgia Supreme Court held that, even though compelled blood alcohol testing fell within the state self-incrimination right, drivers were not entitled to receive *Miranda*-like warnings on the roadside before the issue of testing was raised by the police. The justices held that *Miranda* warnings fall within federal constitutional doctrine for compelled speech and thus are inapposite to state constitutional protections for compelled behavior.[132] As there was no state constitutional precedent or history to support requiring warnings before compelled behavior, and there was no strong policy reason to impose such a regime now, the Georgia Supreme Court refused to do so.

Notably, in this line of DUI cases the Georgia Supreme Court did not announce or explicitly rely on a state level UCD. In *Elliott*, for example,

(Ga. 1990); Robinson v. State, 348 S.E.2d 662, 669 (Ga. Ct. App. 1986), *rev'd on other grounds*, 350 S.E.2d 464 (Ga. 1986). It also confirmed that submitting to a blood draw does not amount to compelled behavior because it requires only passive participation, not active engagement. *Olevik*, 806 S.E.2d at 517.

[126] The federal self-incrimination provision applies only to statements, not to acts, even in the blood alcohol testing context. South Dakota v. Neville, 459 U.S. 553, 559 (1983); *Schmerber*, 384 U.S. at 761.

[127] Elliott v. State, 824 S.E.2d 265, 286-87 (Ga. 2019).

[128] *Id.* at 287.

[129] *Id.* at 295. Because *Elliott* was a case in which the driver refused to submit, the court reserved the question of whether threatening evidentiary consequences would vitiate the voluntariness of any consent that might be given to take the breathalyzer. *Id.* Following this decision, the Georgia Legislature revised its implied consent statute to eliminate language that referred to the risk of evidentiary consequences for refusal. GA. CODE ANN. § 40-5-153 (2022).

[130] *Elliott*, 824 S.E.2d at 296-97 (Boggs, J., concurring).

[131] State v. Turnquest, 827 S.E.2d 865, 869 (Ga. 2019).

[132] *Id.*

the court relied on U.S. Supreme Court precedent for its discussion of the imposition of certain sanctions — evidentiary inferences and suspension of license — under the U.S. Constitution.[133] But the state constitutional context of these cases is undeniable in the Georgia Supreme Court opinions. The *Elliott* court, for example, was clear that imposition of evidentiary consequences for refusal to submit to the breathalyzer was an unreasonable burden on the *state* self-incrimination right, stemming from the court's interpretation of the *state* constitutional provision.[134] It did not rest on the *Griffin v. California* line of cases in the federal constitutional sphere that emanates from *Miranda*.[135] Moreover, although the state argued that it had a compelling interest in prosecuting drunk drivers, and that the regulatory scheme was narrowly tailored to serve that interest, the justices could not find any *state* precedent for using strict scrutiny to justify overcoming *state* level constitutional protections in the criminal procedure area. In *Turnquest*, similarly, the justices refrained from announcing a *state* right to be warned before compelled behavior, after having been convinced that importing such a right from federal *Miranda* warning jurisprudence was both unworkable and unwise.[136]

As the Georgia Supreme Court clearly stated that it was relying on a state constitutional right that was broader than the federal analog and at the same time cited federal precedent in suggesting that a person asserting the state constitutional right could lose the privilege of driving, the Georgia DUI cases seem to illustrate Setting *E* in Table 1. Because the Georgia Supreme Court did not directly define the scope of the state UCD but instead invoked federal doctrine to explain its decision, we infer that Georgia wants to follow the federal UCD in this regard. But this kind of inference is, ironically, at odds with the state's decision to define the scope of the right on its own terms. The careful language of the opinions in this trilogy of cases demonstrates the state court's evident concern with noting the precise relationship between the state right and the federal right, but the court refrained from articulating an explicitly state-based doctrine to guide its consideration of the regulatory burden imposed on this state-based right. That, we argue, was a missed opportunity. As we explain further in Part IV, to offer proper protection for state constitutional rights, state courts should

[133] *Elliott*, 824 S.E.2d at 288.

[134] *Id.* at 296.

[135] *Id.* at 287-88 (discussing Griffin v. California, 380 U.S. 609 (1965) (holding that the Fifth Amendment bars prosecutors from commenting on a defendant's refusal to testify)).

[136] *Turnquest*, 827 S.E.2d at 869.

follow the same practice with respect to unconstitutional conditions as they do in defining the constitutional right. They should explicitly consider the existence and scope of the state's UCD.

IV. TOWARD A DOCTRINE OF STATE UNCONSTITUTIONAL CONDITIONS

Many pressing issues potentially implicate state UCDs. But despite the importance of these concerns and despite the continuing focus on state constitutional law in other areas,[137] courts and commentators[138] generally have failed to propose, or even to address, UCDs at the state level, aside from the limited engagement of the California courts.

In this Essay, we do not advance a single definitive doctrine that states should adopt. The doctrines that develop should reflect the particular constitutional jurisprudence of each state, using such sources as the state's history, legal traditions, or values. We highlight critical elements that should be present in any state UCD, drawing on the federal doctrine and scholarly literature as a guide.

A threshold issue is whether the benefit being denied really is discretionary as a matter of state law. Just as states might have their own doctrines articulating the privilege against self-incrimination or the right to privacy, they also might provide their residents *rights* to undertake certain activities, rather than simply offering *benefits* to help accomplish these undertakings. In other words, state constitutions may grant residents the *right* to engage in activities that are typically subject to licensing regimes in other places, such as driving, hunting, and pursuing certain business activities.[139] To the extent the state recognizes

[137] *See, e.g.*, SUTTON, *supra* note 9 (emphasizing importance of state constitutional law).

[138] California's brief dalliance with a distinctive UCD in *Myers* occasioned some scholarly commentary on the case. *See, e.g.*, David M. Schoeggl, *New Life for the Doctrine of Unconstitutional Conditions? —* Committee to Defend Reproductive Rights v. Myers, *29 Cal.3d 252, 625 P.2d 779, 172 Cal. Rptr 866 (1981)*, 58 WASH. L. REV. 679 (1983) (tracing development of UCD under California and federal law); Charles W. Sherman, Committee to Defend Reproductive Rights v. Myers*: Abortion Funding Restrictions as an Unconstitutional Condition*, 70 CALIF. L. REV. 978 (1982) (discussing California UCD in the context of abortion funding); Nancy Lynn Walker, Committee to Defend Reproductive Rights v. Myers*: The Constitutionality of Conditions on Public Benefits in California*, 33 HASTINGS L.J. 1475 (1982) (analyzing UCD as applied to public benefits programs under California and federal law). For works discussing the potential application of *Myers* in other contexts, see Erica Franklin, *Challenging Child Exclusion in California State Court*, 26 BERKELEY J. GENDER L. & JUST. 1, 11-18 (2011); Antony B. Klapper, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739, 806-14 (1993).

[139] *See* Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 S.D. L. REV. 201, 203-04, 204 n.14 (2016) (collecting state constitutional provisions protecting the right to hunt or fish).

a right (rather than a license) to engage in protected activities, the analysis would shift away from the unconstitutional conditions framework because that framework depends on a discretionary benefit scheme. In the absence of a discretionary benefit, the focus would turn to the nature of the right and acceptable burdens on the right. In the remainder of this Part, we will assume that the situations involve some kind of discretionary benefit rather than a grant of rights.

Important factors that have emerged in the scholarly literature thus far include germaneness (the degree of relationship between the relinquished right and the government's interest in regulating the conditioned benefit); the strength of the government's interest in seeking the forbearance of the right; and the strength of the individual's interests in obtaining the benefit and in exercising the right at issue. Scholars have also highlighted the concept of coercion in seeking to understand whether the government's proffered bargain (benefit in exchange for rights waiver) impermissibly burdened the right.[140] In the discussion below, we illustrate these factors in the DUI self-incrimination situation that sparked litigation in Georgia. Specifically, we focus on whether Georgia may revoke or suspend driver's licenses because the drivers assert their self-incrimination right by refusing to submit to a breathalyzer test after being arrested for DUI. To put the issue in the framework of unconstitutional conditions, the question is whether Georgia can condition the privilege of driving in the state on waiver of the state constitutional right against self-incrimination following arrest for DUI.[141]

Germaneness: The condition is certainly germane. The government threatens to withhold a driver's license only in situations in which a person insists on exercising a related right. Submitting to a blood-breath alcohol test following arrest for DUI is closely connected to the

[140] *See* State v. Okken, 364 P.3d 485, 492 (Ariz. Ct. App. 2015) ("[T]he cases involving arguments that unconstitutional conditions have been attached to state-proffered benefits . . . have turned on analysis of four general variables: (1) the nature of the right affected, (2) the degree of infringement of the right, (3) the nature of the benefit offered, and (4) the strength and nature of the state's interest in conditioning the benefit." (quoting Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 151 (1968)) (internal quotation marks omitted)).

[141] We remind the reader that this question is distinct from whether the Fourth Amendment permits an officer to conduct a warrantless search of the driver's deep lung air via an Intoxilyzer machine, pursuant to the "search incident to arrest" warrant exception. *See* Birchfield v. North Dakota, 579 U.S. 438, 444 (2016); *see also supra* note 123 (discussing Fourth Amendment relevance).

government's interest in requiring a license to drive for safety reasons.[142] The government's interest in highway safety encompasses both the reason for requiring a license to drive and the condition of submitting to a blood-breath alcohol test if arrested on suspicion of DUI.

Strength of government's interest: Analyzing the strength of the government's interest in the condition is more complex. Numerous Supreme Court opinions have acknowledged the government's powerful interest in reducing the incidence of driving while intoxicated.[143] In most instances, though, the condition does not relate precisely to that interest. No one questions that the government can condition driving on having a blood alcohol level below a certain limit, but the constitutional question relates to the procedure for testing. While forcing a driver to take a breathalyzer poses no Fourth Amendment concerns, in Georgia this practice does implicate self-incrimination because the driver must affirmatively blow into the Intoxilyzer machine. Drawing blood from a recently arrested driver, in contrast, poses no self-incrimination problems[144] but does require a warrant under the Fourth Amendment, unless exigent circumstances are present.[145] To harmonize federal and state requirements, police in Georgia could, instead of utilizing a breath test, seek a warrant to obtain a blood test and thereby comply with both federal privacy rules and state self-incrimination rules.

Strength of individual's interest in privilege and in right: With regard to the individual's interest, two issues deserve attention. The first is the individual's interest in driving. That interest seems quite strong, but it may vary by state or by locality. For example, even without regard to any governmental interest, the individual's interest in driving in Atlanta

[142] *See, e.g.*, Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (reaffirming the constitutionality of state statues that punish a refusal to submit to a blood draw with automatic license revocation); *Birchfield*, 579 U.S. at 476-77 ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."); Missouri v. McNeely, 569 U.S. 141, 160-61 (2013) ("As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws."); South Dakota v. Neville, 459 U.S. 553 (1983) (holding that drawing an adverse inference from the defendant's refusal to submit to a blood draw does not violate the Fifth Amendment right against self-incrimination).

[143] *See* cases cited *supra* note 142.

[144] *See* Olevik v. State, 806 S.E.2d 505, 517 (Ga. 2017) (noting that a blood draw requires only passive participation, not active engagement by the driver, and thus does not compel incriminating behavior).

[145] *See Mitchell*, 139 S. Ct. at 2534; *McNeely*, 569 U.S. at 145.

or other urban areas may be diminished, given mass transit alternatives.[146] A different calculus would apply in suburban or rural regions without public transit options. The second individual interest is the interest implicated by the constitutional right at issue. Any constitutional right certainly involves a significant concern, but it might be possible to distinguish among the rights. While a right to refuse a medical procedure might weigh quite heavily, the stress caused by providing a breath sample would be a much smaller inconvenience.[147]

Coercion: In the DUI situation, the coercion framework yields different conclusions, depending on the particular perspective adopted. One could focus on the individual case to determine whether the government seeks to penalize the exercise of a constitutional right or instead to advance a separate, legitimate governmental interest. Here, the relevant question would be whether the government would withhold a person's driver's license if it knew the person would refuse to consent to a blood-breath alcohol test. The answer appears to be yes. The government does not want people driving unless they are willing to subject themselves to an alcohol test following arrest for DUI. As with germaneness, the requirement of undergoing the test advances the government's interest in the underlying licensing regime. Ensuring highway safety, where people drive dangerous machines at high speeds, serves as the reason both for requiring a license and for requiring submission to the blood-breath alcohol test. The purpose of revoking the license is to get potentially drunk drivers off the road. The revocation is not simply a sanction to induce compliance, though it may do that as well as further highway safety. In this sense, requiring submission to the test as a condition of driving is not coercive.[148]

Some scholars, though, focus on the overall government plan.[149] From this perspective, the relevant question would be, assuming the

146 Presumably the viability of a mass transit option is diminished even with an extant mass transit infrastructure if a person is obligated to commute at a time when mass transit is not in operation. *Cf.* Jonathan Remy Nash, *Economic Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 713 n.256 (2008) (noting that some London workers argued for exemption from the congestion pricing regime applicable to motor vehicles since they had to commute to work overnight when few public transit options were available).

147 *See Birchfield*, 579 U.S. at 461-64 (describing the unintrusive nature of the breath sample process, which renders it outside the Fourth Amendment's privacy sphere once a driver has been arrested for DUI).

148 *See* Berman, *Coercion Without Baselines*, *supra* note 29, at 46 n.168.

149 *See, e.g.*, Elhauge, *supra* note 61, at 560-61 (discussing Frost v. R.R. Comm'n, 271 U.S. 583 (1926)); Kreimer, *supra* note 51, at 1372 (setting forth a test based on what the government would do if acting without regard to people's exercise of their

government could not condition driving on submitting to the blood-breath alcohol test, whether the government would still allow people to drive. The answer to this question is clearly yes. On the programmatic level, given our modern economy, the government would certainly choose a system of granting unconditioned licenses over a system of granting no licenses. Although the government prefers unconditioned licenses to no licenses, it uses its leverage over licenses to compel people to give up their constitutional rights. Within this framework, the DUI regime appears coercive.

One also could speculate about the outcome if Georgia were to adopt the California UCD as set forth in *Myers*.[150] Revoking a driver's license for refusing a breath alcohol test would seem to meet the first two elements of the test. First, the condition of agreeing to a breath alcohol test is related to the overall purpose of the driving license regime. Both the licensing scheme and the condition advance highway safety. Second, one could certainly argue that the benefit of the condition clearly outweighs the resulting impairment of constitutional rights. Reducing death and injury from impaired driving could well outweigh the burden of submitting to a breath alcohol test. However, the third prong of the *Myers* test presents more difficulty. Is a compelled breath alcohol test the least "offensive" alternative available to the state to address this interest in highway safety?[151] Arguably the state could insist that officers always take blood rather than breath samples, and that they obtain warrants before taking such samples. The Supreme Court reached this conclusion in *McNeely v. Missouri*,[152] when it refused to allow exigent circumstances categorically to justify blood draws during DUI arrests. The Court then reiterated that conclusion in *Birchfield v. North*

constitutional rights); *cf.* Berman, *Coercion Without Baselines*, *supra* note 29, at 46 n.168 (contrasting applying coercion test at individual level and at programmatic level).

A related issue not generally discussed by scholars is the penalty for reneging on a bargain once entered. If a person accepts the condition by driving in a state, then refuses the blood test, what are the available sanctions? Can the person lose a driver's license, be subject to other administrative sanctions, or suffer criminal penalties? The Supreme Court has approved of the imposition of administrative penalties but has disallowed the imposition of criminal sanctions for refusal to submit to a blood draw. *Birchfield*, 579 U.S. at 477. All penalties are allowed when the driver refuses to submit to a breathalyzer. *Id.*

[150] *See* Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 789 (Cal. 1981). Note that California courts have rejected unconstitutional conditions challenges — under the Fourth Amendment — to the state's implied consent blood alcohol testing regime. *See* Espinoza v. Shiomoto, 215 Cal. Rptr. 3d 807, 825 (Ct. App. 2017).

[151] *See Myers*, 625 P.2d at 789.

[152] 569 U.S. 141, 165 (2013).

Dakota,[153] when it refused to allow such draws to be justified as incident to arrest. The state could establish a system to ensure that a judicial official is always available to receive a warrant request. Modern telephonic warrant systems facilitate the expeditious grant of search warrants in many jurisdictions.[154] That said, we wonder whether drivers would consider the blood draw procedure more invasive and unpleasant than providing a breath sample, even after a magistrate had approved its use. On balance, is a regime of blood draws actually preferable?

When state constitutions offer residents greater protections than the federal Constitution provides, the value of developing a state-level UCD is especially great. The kinds of burdens that a state may impose on a constitutional right compose a critical dimension of that right. The Georgia Supreme Court, for instance, has clearly articulated a self-incrimination right against compulsory alcohol breath tests that is broader than the federal self-incrimination right, which protects only compelled speech.[155] The Georgia-specific right derives from the particular history of the state itself, a history the Georgia Supreme Court has decided to honor rather than reject.[156] However, that court has not addressed the issue of a state-level UCD. Articulating the scope of Georgia's UCD would further define the breadth of the state constitutional protection under the state's own self-incrimination clause.

We have used the example of the Georgia DUI cases to illustrate the potential value of a state unconstitutional conditions analysis, but the framework has broader applicability. In evaluating COVID-related safety measures or other state laws implicating the UCD, courts will have to tailor their analysis to the particular government scheme requiring that a person or entity relinquish state constitutional rights as a condition of receiving benefits. The calculus will likely differ among the states based on such factors as their respective histories, legal traditions, or values.[157] Even physical and human geography might play

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[153] *Birchfield*, 579 U.S. at 476.

[154] *See id.* at 488-89 (Sotomayor, J., concurring in part and dissenting in part) (noting the significance of telephonic warrant systems).

[155] Olevik v. State, 806 S.E.2d 505, 509 (Ga. 2017).

[156] *See id.* at 516; Brown v. State, 426 S.E.2d 559, 562 (Ga. 1993) (stating that defendant could not be compelled to give a handwriting exemplar); Day v. State, 63 Ga. 667, 668-69 (1879) (holding that defendant could not be compelled to place his foot in a footprint).

[157] *See* GARDNER, *supra* note 9, at 42-45 (reviewing different approaches to state constitutional interpretation); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 851-75 (2011); Robert F. Williams, *In the Glare of The Supreme Court: Continuing Methodology and Legitimacy Problems in Independent*

a role. For example, in Alaska, with its broad outdoor spaces, relatively low-density population, and robust state constitutional tradition of protecting privacy,[158] courts might skeptically review various mandates imposed by state and local governments for public health purposes. The analysis might differ in more urban settings with less robust state constitutional protections, denser population centers, or greater traditions of collective cohesion. To be sure, scholars disagree on the extent to which states have distinctive values that should determine the interpretation of their constitutions.[159] But there is broad consensus that the text of each state's constitution, along with its history and prior interpretation, should play an important interpretive role.[160] As stated by Justice Goodwin Liu, "To the extent that a state constitutional provision has particular textual or historical features that distinguish it from its federal counterpart, judicial interpretation can and must reflect those state-specific features."[161]

As states have adopted or approved of different methodologies when interpreting their respective constitutions, states might also adopt different approaches to developing their individual doctrines of unconstitutional conditions, and they might reach different conclusions about what burdens are acceptable. The key point is that state courts should formulate these doctrines themselves, rather than reflexively invoking the federal doctrine and then regarding the issue as closed. Given the pervasiveness of state licenses, contracts, employment offers, and similar benefits, a state level UCD thus could inspire state courts to develop a more complex vocabulary about the burdens imposed on state constitutional rights, which might lead to more safeguards for citizens.

State Constitutional Rights Adjudication, 72 NOTRE DAME L. REV. 1015, 1055-64 (1997); *see also* G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 15-21 (2011).

[158] *See* Ravin v. State, 537 P.2d 494, 511 (Alaska 1975) (relying on the distinctive character of Alaska in holding that criminalization of personal use of marijuana at home violated state constitutional protections of privacy).

[159] For a discussion of how different constitutional traditions may implicate the development of distinctive interpretations of state constitutions, see GARDNER, *supra* note 9, at 1-18. Gardner presents a strong critique of the notion that states have distinctive values that should determine the interpretation of each state's constitution. *See id.* at 53-79; *see also* Goodwin Liu, *State Constitutions and the Interpretation of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1327-28 (2017) (noting state constitutionalism also rests on the desire "to satisfy the wishes of the national polity of which they are members concerning the character and content of political life throughout the nation").

[160] *See, e.g.*, Liu, *supra* note 15, at 1330 (discussing methods of state constitutional interpretation).

[161] *Id.*

Moreover, creating state-level UCDs would promote greater interjurisdictional dialogue.[162] Courts could learn from and engage with the doctrinal developments in other states, and these state-level developments could in turn inform federal doctrine.[163]

CONCLUSION

Some burdens on constitutional rights take the form of direct confrontations between the government and the individual. The government seeks to regulate certain conduct, and the question is whether a person has a right to be free from governmental intrusion. Other burdens take the form of government offers. The government proffers a benefit, but only if the individual agrees not to exercise a constitutional right. While these kinds of regulatory and statutory burdens might be less direct, they may be no less substantial or costly to our system of governance.

The pervasiveness of regulation at the state level translates into a broad universe of permits, licenses, and other benefits that an individual may experience as necessary to live his or her life. For example, more than 220 million people hold state-issued drivers' licenses.[164] Approximately thirty-five million people — over 20% of the civilian labor force — hold state-issued occupational licenses,[165] and over twenty-one million people have concealed carry permits for handguns, issued by state agencies pursuant to state law.[166] Each of these state-granted privileges, meant to facilitate our livelihoods, also serve as a

[162] *See* Liu, *supra* note 15, at 1338 (noting possibility of "mutually informative dialogue across jurisdictions").

[163] *See* SCHAPIRO, *supra* note 26, at 98-101; SUTTON, *supra* note 9, at 19-20; Steven G. Calabresi, Sarah E. Agudo & Katherine L. Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685, 686 (2015); Liu, *supra* note 159, at 1333 ("[S]tate courts and federal courts are engaged in a common dialogue when it comes to interpreting various rights secured by both the federal and state constitutions."); *see also* Blocher, *supra* note 26, at 341-46 (discussing state constitutional law as "useful tool" in interpreting the federal Constitution).

[164] Mathilde Carlier, *Total Number of Licensed Drivers in the U.S. in 2020, by State*, STATISTA (Feb. 22, 2022), https://www.statista.com/statistics/198029/total-number-of-us-licensed-drivers-by-state/ [https://perma.cc/VZ28-4GNQ].

[165] U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., CERTIFICATION AND LICENSING STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER BY EMPLOYMENT STATUS, 2021 ANNUAL AVERAGES (2021), https://www.bls.gov/cps/cpsaat49.pdf [https://perma.cc/H3CJ-32AM].

[166] JOHN R. LOTT, JR., CARLISLE E. MOODY & RUJUN WANG, CRIME PREVENTION RSCH. CTR., CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2021, at 3 (2021).

potential fount of government power and a potential threat to state constitutional rights.

The public health crisis precipitated by the COVID-19 pandemic multiplied the actual and potential conflicts between state privileges and state constitutional rights. The mandates for masking, testing, vaccinating, boosting, quarantining, contact tracing, and other important — and potentially intrusive — health measures might constrain the availability of state benefits for residents who otherwise depend on the state's largess. The development of state constitutional rights to abortion may well present similar conflicts if states with such a right impose licensing and funding requirements that limit its availability. As the UCD recognizes, every benefit, whether COVID-related or otherwise, potentially supplies the government with a tool to circumvent a constitutional right, diluting its importance for the future and potentially driving a wedge between members of the polity who are forced to sacrifice and those who are not.

While scholars and courts have labored to articulate a coherent UCD, they have focused on formulating a federal doctrine to safeguard federal constitutional rights; they have ignored the intersection of state benefits and state constitutional rights. In so doing, they have failed to recognize the significance of defining state doctrines specifically to address the use of state benefits that intersect with, and potentially diminish, state rights. Thus, the exchange of state rights for state-provided benefits has largely gone unnoticed, and state supreme courts have missed an opportunity to contour state rights with more precision. We do not suggest that any of these mandates or programs are unconstitutional, but rather aim to inspire state supreme courts to formulate and take seriously their own state doctrines to better address the constitutionality of these programs going forward.

Courts in some states may find that the public good justifies requiring individuals to forgo state constitutional rights as a condition of receiving state benefits. Courts in other states may disagree, opting to prioritize the individual rights-holder over the collective good. However, to honor their obligations to enforce state constitutions and assess these claims comprehensively, courts in all states not only must recognize the state constitutional rights at issue but should also develop a state doctrine of unconstitutional conditions to determine their scope. Without such a doctrine, state constitutional protections are more matters of grace than of right.